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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS ALEJANDRO MONTES,

Defendant and Appellant.

B213485

(Los Angeles County
Super. Ct. No. PA062553)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Shari K. Silver, Judge. Affirmed.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Keith H. Borjon and A. Scott Hayward, Deputy Attorneys General, for Plaintiff and Respondent.

Following denial of his motions to suppress evidence and to set aside the information, Jesus Alejandro Montes (appellant) pleaded no contest to possession of a controlled substance in violation of Health and Safety Code section 11377, subdivision (a). Pursuant to a plea agreement, the trial court placed appellant on formal probation for three years and ordered him to serve 180 days in county jail.

Appellant appeals on the ground that his consent to search his car was involuntary, and his motion to suppress evidence should have been granted.

FACTS

We obtain the facts from the transcript of the hearing on the motion to suppress, which was held concurrently with the preliminary hearing. On August 11, 2008, at approximately 6:30 p.m., Officer Jedd Levin (Levin) of the Los Angeles Police Department and his partner, Officer Velazquez (Velazquez), were parked in their unmarked car near the intersection of Keweenaw Avenue and Van Nuys Boulevard. A Detective McKinney (McKinney) was present in another unmarked car. Police had received information from an anonymous citizen that narcotics were being sold from a business at that location, and the officers were conducting surveillance of the building. From the street, the business appeared to be closed. Its security gate was shut and locked with a chain.

McKinney communicated to Levin that he had seen a tan Chevrolet Avalanche pull into the driveway adjacent to the business. A man, later identified as appellant, got out of the car and walked into an open door at the rear of the building. After a few minutes, appellant came out and walked back to his car. He had what seemed to be a white paper towel wadded up in his hand. Before getting into his car, he unfolded the towel and appeared to look at its contents. Based on his training, experience, and the circumstances, Levin viewed appellant's behavior as consistent with that of someone who had just come into possession of narcotics.

McKinney informed Levin and Velazquez that the Avalanche was leaving, and the officers decided to follow the car for a few blocks to conduct "mobile surveillance."

McKinney verified that the car they followed was the same car he had seen, and the driver was the same person who drove the car into the driveway.

After a short time, appellant's car pulled into a driveway on Filmore Street. As appellant was pulling in, another man was coming out of the property through the side driveway gate, and he was speaking on a cell phone. When appellant parked the car and was in the process of getting out, the second man approached the passenger side and leaned in through the open window. He placed his hands inside appellant's car out of Levin's view.

Levin testified that the conduct he saw was consistent with a type of narcotic sales called "call-and-delivery" in which a person in a vehicle meets another person at a location, and the exchange of narcotics is done either in the vehicle or with the hands in the vehicle in a manner designed to avoid detection by the police.

The officers decided to detain both suspects pending their narcotics investigation. Levin approached the two men with his weapon out, but he reholstered his weapon before reaching them. When detaining appellant, Levin noticed appellant was abnormally nervous and fidgety and appeared to be upset over the officers coming into contact with him. Levin asked appellant if he had anything illegal or any weapons in the car and if it would be all right to search the car. Levin stated that "somewhere within a pretty close proximity to me making contact with him, he was placed in handcuffs due to his kind of erratic behavior." On direct examination, Levin did not recall whether appellant was in handcuffs before he was asked for consent or after, although he later gave the court a chronology of his actions. At the time he asked for consent, Levin did not have his weapon drawn. At that moment, Velazquez was to his right, at the rear of appellant's car. McKinney was on the passenger side of appellant's car, making contact with the man who had come out of the house.

Appellant told Levin that he did not have anything illegal and that the officers could search the car. Levin removed the cup holder from the center console and found a small clear bindle containing crystalline solids resembling methamphetamine. He found

a white paper towel that had been “crumbled up” and was placed around a glass pipe with a ball at the end. The pipe appeared to have crystalline residue and to be a pipe used for ingesting methamphetamine.

The parties stipulated that the crystalline solids were analyzed and found to contain 0.21 net grams containing methamphetamine. Levin believed that was a usable amount of methamphetamine.

Upon being asked by the trial court to repeat the chronology of events, Officer Levin said he drew his weapon when getting out of his car because of the way the two men were dressed and the gang graffiti he saw written all over the wall. As he closed the distance between himself and appellant, he reholstered his weapon. Officer Levin told appellant to step away from the open door of the car and move to the rear of the car. He asked appellant if he was on parole or probation and if he had ever been arrested. Appellant indicated at some point during that portion of the conversation that he had a prior weapons arrest. Because of that response and appellant’s nervous behavior, Officer Levin was wary of a possible weapon in the car. At that time, he placed appellant in handcuffs and asked if he could search the car.

DISCUSSION

I. Proceedings Below

The trial court heard extensive argument largely focused on the issue of reasonable suspicion to detain. The trial court found that there was reasonable suspicion to detain based on the totality of the circumstances. The trial court also noted that, prior to handcuffing appellant, the officer ascertained that appellant had a prior weapons offense and observed that appellant was nervous and fidgety. The trial court found that the handcuffing was legitimate because of appellant’s statements. Citing *In re Antonio B.* (2008) 166 Cal.App.4th 435 (*Antonio B.*), the trial court stated that, in order to find a valid consent to search when the person consenting is in handcuffs, there must be one of two criteria met: either the person poses a threat to the officers or a threat to flee.

Because of appellant's statements, the trial court impliedly found he met the criterion of posing a threat.

II. Appellant's Argument

Appellant contends the trial court should have granted the motion to suppress because the means by which the investigative detention was carried out exceeded what was reasonably necessary in his case. Appellant does not challenge the fact that a detention was permissible. Rather, he challenges only the manner in which the detention was conducted.

Appellant argues that, when the handcuffing of a detainee is not reasonably necessary, the detention becomes a de facto arrest, which, like any other arrest, must be supported by probable cause. Here, there was no testimony that Levin had probable cause to arrest appellant at the time he placed him in handcuffs. There was no testimony appellant appeared to have a weapon or acted as if he had one. Therefore, the detention/de facto arrest was unconstitutional. Consent induced by an unconstitutional arrest, detention or search is not voluntary.

If the police violate a defendant's Fourth Amendment rights before obtaining consent, any evidence obtained as a result of the search is admissible only if the prosecution shows that there was sufficient attenuation to render the consent voluntary. Appellant argues there was insufficient attenuation here, which leads to an involuntary consent. (See *People v. Henderson* (1990) 220 Cal.App.3d 1632, 1651.) Therefore, the fruits of the search following appellant's consent should have been suppressed.

III. Relevant Authority

On appellate review of a trial court's ruling on a motion to suppress evidence, the appellate body must accept the trial court's resolution of disputed facts and its assessment of the credibility of witnesses if supported by substantial evidence. (*People v. Williams* (1988) 45 Cal.3d 1268, 1301; *People v. Valenzuela* (1994) 28 Cal.App.4th 817, 823.) The trial court has the power to judge the credibility of witnesses, resolve any conflicts in testimony, weigh the evidence, and draw factual inferences for the purpose of making its

factual findings. (*People v. Lawler* (1973) 9 Cal.3d 156, 160.) The trial court has the power to decide “what the officer actually perceived, or knew, or believed, and what action he took in response.” (*People v. Leyba* (1981) 29 Cal.3d 591, 596.)

In the second step of a review of the grant or denial of a motion to suppress, the appellate court is required to independently apply the law to the factual findings. (*Ornelas v. United States* (1996) 517 U.S. 690, 696–698; *People v. Loewen* (1983) 35 Cal.3d 117, 123.) The appellate court must determine if the factual record supports the trial court’s conclusions as to whether or not the detention met the constitutional standard of reasonableness. (*Ornelas v. United States, supra*, at p. 696 [determination of reasonable suspicion a mixed question of law and fact]; *People v. Lawler, supra*, 9 Cal.3d at p. 160.)

“The federal Constitution’s Fourth Amendment, made applicable to the states through the Fourteenth Amendment, prohibits unreasonable seizures. Our state Constitution includes a similar prohibition. [Citation.] ‘A seizure occurs whenever a police officer “by means of physical force or show of authority” restrains the liberty of a person to walk away.’ [Citations.]” (*People v. Celis* (2004) 33 Cal.4th 667, 673 (*Celis*)). “When the seizure of a person amounts to an arrest, it must be supported by an arrest warrant or by probable cause. [Citation.]” (*Ibid.*) “Because an investigative detention allows the police to ascertain whether suspicious conduct is criminal activity, such a detention ‘must be temporary and last no longer than is necessary to effectuate the purpose of the stop.’ [Citations.]” (*Id.* at p. 674.)

IV. Motion to Suppress Properly Denied

As noted, appellant does not question the lawfulness of his being detained, but rather, the manner in which he was detained. He asserts his detention was a de facto arrest due to the officer’s use of handcuffs. “The distinction between a detention and an arrest ‘may in some instances create difficult line-drawing problems.’ [Citations.]” (*Celis, supra*, 33 Cal.4th at p. 674.) The issue must be decided upon the facts of each case. The focus must be on whether the police pursued a means of criminal investigation

that was reasonably designed to confirm or dispel their suspicions quickly and by using the least intrusive means reasonably available under the existing circumstances. (*Id.* at pp. 674–675.) We must look at the duration, scope, and purpose of the detention as well as the facts known to the officer in order to determine whether the officer’s actions went beyond what was necessary to achieve the purpose of the detention. (*Id.* at pp. 675–676.)

In this case, Levin’s purpose was to detain appellant in order to conduct a narcotics investigation. He had just seen appellant looking at the contents of a paper towel in his hand after leaving a building reported to be involved in narcotics sales. Levin had also seen someone meet appellant’s car in the driveway and lean into the car on the passenger side to the degree that his hands could not be seen. Levin recognized this as typical behavior in a certain type of narcotics transaction—“call and delivery.” Levin observed that appellant was unusually nervous and upset when he was approached by the officer, and he considered appellant’s behavior to be “erratic.” Levin asked appellant if he was on parole or probation, and appellant admitted having been arrested for a weapons offense. Because of these facts, Levin said he was wary of there being a weapon in the car. Therefore, he handcuffed appellant. We note that Levin and the other two officers were dealing with two subjects and the suspects were therefore not greatly outnumbered. The officers had noted gang writing on the wall at the residence where appellant stopped, and they believed appellant and the person who came out to meet him wore gang-type clothing. This caused Levin enough apprehension to initially draw his gun as he got out of his car. It appears he put his gun away almost immediately, but the fact that he was dealing with someone who might be gang affiliated and who had apparently just purchased narcotics were significant factors that added to the totality of the circumstances. The record indicates that the duration of the handcuffing before the contraband was found was short, and the scope of the search was limited to the passenger compartment. The drugs were found almost immediately under the cup holder, which appears to have been the first place Levin looked. The alternative to handcuffing would have been to pat down appellant, but this would not have assuaged the officer’s

apprehension about a gun in the car. “Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.” (*Terry v. Ohio* (1968) 392 U.S. 1, 23.)

In *Celis*, for example, the defendant was under surveillance because he was the registered owner of a red truck where a large amount of cash had been found in a narcotics trafficking investigation. A statewide group was suspected of transporting drugs inside large truck tires. The red truck had delivered such a tire to a residence where police found another large amount of cash and a tire that had been sliced open. (*Celis, supra*, 33 Cal.4th at pp. 671–672.) When police subsequently observed the defendant rolling a large truck tire toward the alley behind his house at the same time as a pickup driven by an acquaintance of his arrived, a detective pulled out his gun and ordered defendant and the other man to stop. (*Id.* at p. 672.) Defendant was handcuffed and told to sit down on the ground while officers walked through his house to determine if there was someone there who was a threat to their safety. (*Ibid.*)

Celis complained he was subjected to a warrantless arrest when he was handcuffed and made to sit down. (*Celis, supra*, 33 Cal.4th at p. 674.) The Supreme Court disagreed, stating that “stopping a suspect at gunpoint, handcuffing him, and making him sit on the ground for a short period, as occurred here, do not convert a detention into an arrest.” (*Celis, supra*, at p. 675.)

This proposition was cited by *Antonio B.*, *supra*, 166 Cal.App.4th at page 441, a case relied upon by appellant and the trial court. (*Id.* at p. 441.) *Antonio B.* added that, although handcuffing a suspect for a short period of time does not necessarily transform a detention into an arrest, it does not follow that handcuffing will never transform a detention into an arrest. (*Ibid.*) “The issue is whether the use of handcuffs during a detention was reasonably necessary under all of the circumstances of the detention.” (*Ibid.*)

In *Antonio B.*, the detention was deemed a de facto arrest. (*Antonio B., supra*, 166 Cal.App.4th at p. 442.) The court found that the circumstances did not implicate a

reasonable necessity to handcuff the defendant. Antonio B. was walking with another teenager who was smoking marijuana, and the police believed Antonio B. might have been sharing it. The court found that all of the circumstances—the suspected offense was a misdemeanor, the officers outnumbered the two suspects (one of whom was appropriately handcuffed and under arrest), there was an absence of people nearby, and appellant did not try to flee—led to the conclusion there was no evidence the officers had any basis to believe appellant posed a danger, or that handcuffing was necessary to achieve the purpose of the stop. (*Ibid.*)

In *Antonio B.*, however, the only justification given by the officer who handcuffed the minor was that “‘We always handcuff people if we’re going to detain him [*sic*]. For further investigation, it’s our procedure and our policy to handcuff people.’” (*Antonio B.*, *supra*, 166 Cal.App.4th at p. 439.) The appellate court found that this “‘policy’” led to a failure to consider the circumstances of the individual case and to use the least intrusive means available to detain the suspect, as the Constitution requires. (*Id.* at p. 442.)

In *People v. Stier* (2008) 168 Cal.App.4th 21 (*Stier*), another case relied on by appellant, two police officers stopped a pickup truck for an equipment violation after DEA agents told them about a narcotics transaction involving the occupants of the truck. (*Id.* at pp. 24–25.) An Officer Johnson (Johnson) detained a passenger who attempted to walk away, and he found narcotics in her pocket after she gave consent to search her. (*Id.* at p. 25.) As another officer, Officer Leahy (Leahy) was speaking to the driver (Stier), Johnson told Leahy about the narcotics he had found. (*Ibid.*) Leahy then asked Stier to get out of the truck. Leahy described Stier as having been very cooperative, mellow, easygoing, and not at all nervous. (*Ibid.*) When Stier got out of the car, Leahy was shocked to see that his height was approximately six feet six inches, which made Leahy feel “‘uncomfortable.’” Because of Stier’s height and because Leahy knew that persons involved in narcotics often carry weapons, Leahy decided to handcuff Stier. (*Ibid.*) Stier denied having any narcotics or weapons and told Leahy to go ahead and check. Leahy found narcotics in Stier’s pocket. (*Ibid.*)

The appellate court agreed with Stier that the prosecution did not establish that Leahy lawfully detained Stier in handcuffs and lawfully obtained his consent to be searched. (*Stier, supra*, 168 Cal.App.4th at p. 26.) The evidence did not establish that Leahy had a reasonable basis for believing Stier was a safety or flight risk when he was handcuffed. (*Id.* at p. 28.) Leahy testified he did not believe Stier had any narcotics, and Leahy did not state any specific, articulable facts suggesting Stier was armed, had committed a violent crime, or was about to commit one. Instead, Leahy handcuffed Stier primarily because Stier was four or five inches taller than Leahy. (*Ibid.*) Therefore, the handcuffing was not reasonably necessary, and the consent given by Stier was not voluntary. (*Ibid.*)

In contrast to the officers in *Stier* and *Antonio B.*, Levin provided specific, articulable facts to support his actions. Levin saw appellant behaving erratically and saw that he was visibly upset at being contacted. The fact that a defendant was ““real nervous”” was found to be a legitimate factor in an officer’s decision to handcuff the defendant in *People v. Osborne* (2009) 175 Cal.App.4th 1052, 1062. In that case, the court found that the officer’s act of handcuffing the defendant before performing a pat search did not convert the detention into a de facto arrest. (*Ibid.*) Moreover, in the instant case, appellant was apparently in the midst of an ongoing narcotics transaction and had admitted to a prior weapons offense. Levin reasonably feared there may have been a weapon in the car. We believe that, under the totality of the circumstances, Levin’s conduct in handcuffing appellant and asking for consent to search the car shortly after making his observations and learning of the weapons offense was reasonable. Therefore, appellant’s consent was voluntary, and the motion to suppress was properly denied.

DISPOSITION

The denial of the suppression motion is affirmed.

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_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ